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SUPREME COURT, U.S.

CASE NO. 85-5319

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIE JASPER DARDEN,
Petitioner,
v.
LOUIE L. WAINWRIGHT
as Secretary, Department of
Corrections, State of Florida
Respondent.

On Writ of Certiorari to the Eleventh Circuit

APPLICATION FOR STAY OF EXECUTION
PENDING REVIEW OF
PETITION FOR A WRIT OF CERTIORARI

To: THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

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THIS IS A FIRST WRIT CASE

The Applicant, WILLIE JASPER DARDEN, is a condemned prisoner in the State of Florida whose sentence of death is scheduled to be executed at 7:00 a.m., Wednesday, 04 September 1985. Through undersigned counsel, Applicant invokes the jurisdiction of this Court to stay Petitioner's execution pending the filing and disposition of a Petition for Writ of Certiorari. A stay is necessary for the applicant to be given the opportunity to present to the Court substantial and important constitutional questions worthy of review as to his conviction and sentence.

At the time of filing of the instant application, a stay of execution previously entered by the United States Court of Appeals for the Eleventh Circuit is set to expire, at 9:00 a.m., 03 September 1985, one day before the scheduled execution. Mandate is to issue contemporaneously. The Court has the authority to issue the requested stay pursuant to 28 U.S.C.

2101(f), 28 U.S.C. 1651, and Rules 44 and 51 of the Rules of the Supreme Court of the United States.

The following is stated in support of the application:

I. PROCEDURAL POSTURE OF THE CASE

1. DARDEN was indicted on 23 September 1973 for (R 21-22) one count of first degree murder, robbery and assault with intent to commit murder, to which he plead not guilty. Trial was had before a jury which convicted him on 18 January 1974, and immediately thereafter the jury recommended death. The sentencing judge found three aggravating circumstances, two involving status (under sentence of imprisonment/prior conviction) and two mitigating circumstances, followed the jury recommendation and sentenced Petitioner to death.

2. The Supreme Court of Florida affirmed the conviction and sentence on 18 February 1976, in Darden v. State, 329 So.2d 287 (Fla. 1976). Rehearing was denied on 04 April 1976. A petition for writ of certiorari was filed in this Court, which was granted on 01 November 1976, 429 U.S. 917 (1976). The Court later restricted certiorari to the first of three questions, the issue of improper prosecutorial closing argument, 10 January 1977. After oral argument, the petition was dismissed as improvidently granted on 19 April 1977, 430 U.S. 704. See footnote 6, infra.

3. On 18 May 1979, the Governor of the State of Florida signed a first death warrant on WILLIE DARDEN. He was scheduled to be executed on 23 May 1979. On or about 21 May 1979, the Defendant filed a Motion for Post Conviction Relief, pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Fifth Judicial Circuit. Said motion was denied by the same presiding trial Judge John Dewell on 21 May 1979. The Florida Supreme Court affirmed the trial court's denial of Defendant's 3.850 motion without briefing and denied a stay of execution the same date, 372 So.2d 436 (Fla. 1979). Rehearing was denied on 30 May 1979.

4. On 22 May 1979, pursuant to habeas corpus application, the United States District Court for the Middle District of Florida, Judge William Terrell Hodges, stayed Mr. DARDEN's execution. After an evidentiary hearing, United States Magistrate Paul Game, Jr., Middle District of Florida, issued a Report and Recommendation dated 10 April 1981 recommending that the requested relief be granted (Appendix 001). However,

on review and after a hearing on objections to the report and recommendation of the magistrate the habeas corpus petition was denied by the district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

5. The denial of relief by the district court was appealed to the United States Court of Appeals for the Eleventh Circuit. The decision was affirmed 2-1 in a panel decision issued on 14 February 1983, and corrected 09 March 1983, 669 F.2d 1031 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit, and 01 July 1983 the Court by operation of law affirmed the panel decision by a vote of 6-6, 708 F.2d 640 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit on or about 22 July 1983. On 05 August 1983, while rehearing was pending, the Governor of the State of Florida signed a second death warrant, and Petitioner was scheduled to be executed on 07 September 1983. On 01 September 1983, the Eleventh Circuit, on its own motion, vacated the earlier panel decision and the en banc affirmance, granted en banc reconsideration, and stayed Petitioner's execution, 715 F.2d 502 (11th Cir. 1983).

6. The Eleventh Circuit, again by en banc decision, voted 7-5 to grant habeas relief to Petitioner, on Witherspoon grounds, 725 F.2d 1526 (11th Cir. 1984) on 22 February 1984. The State filed a petition for writ of certiorari to this Court, after a stay of mandate.

7. On 19 February 1985, the United States Supreme Court granted certiorari, in 105 S.Ct. 1158, vacated the Eleventh Circuit's 7-5 en banc decision, and remanded the case for further consideration in light of Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1984). On remand, the Eleventh Circuit affirmed the District Court's original denial of habeas corpus relief, in Darden v. Wainwright, No. 81-5590 (11th Cir. July 23, 1985) (en banc) [J. J. Clark and Johnson, dissenting.] (Appendix 039).

8. Again prior to expiration of time for rehearing, the Governor of the State of Florida signed a third death warrant on 08 August 1985. Petitioner's execution is scheduled for 04 September 1985, at 7:00 a.m. The stay entered 01 September 1983 by the Eleventh Circuit was still in effect at the time the death warrant was signed. Petition for rehearing was sought in the Eleventh Circuit on 16 August 1985, and Supplemental Petition for rehearing was filed on 20 August 1985. Also on 16 August 1985

DARDEN moved to extend and enforce the stay of execution. On 27 August 1985, the Petition for Rehearing was denied, with dissent. The Eleventh Circuit acknowledged that the State of Florida had set an execution date while a stay was in effect, and chose to leave the stay in effect until twenty-four hours before Petitioner's scheduled execution. "At 9:00 a.m., Tuesday, September 3, 1985, the mandate will issue, and the stay of execution heretofore and presently in effect shall terminate." (Appendix 064).

II. A STAY OF EXECUTION SHOULD BE GRANTED TO AFFORD THIS COURT THE OPPORTUNITY FOR AN ORDERLY AND DELIBERATE REVIEW OF THE PETITION FOR WRIT OF CERTIORARI

Sound and reasonable issues exist upon which this Court should grant WILLIE JASPER DARDEN certiorari review in this case. The unilateral action of the executive branch of the State of Florida has robbed Petitioner, and this Court, of the unhurried and deliberative process by which these substantial certiorari issues should be considered in this initial petition for federal habeas corpus relief. Significantly, the state warranted Mr. DARDEN to be executed during the pendency of a stay order. See September 1, 1983 Stay Order, App. at 068; see also App. 064. By the state's action, Mr. DARDEN's worthy certiorari petition appears as a last-minute, last-ditch attempt by a condemned inmate to forestall his execution, when clearly such is not the case.

Mr. DARDEN has vigorously and conscientiously pursued relief from his conviction and death sentence, based on a crime for which he has never wavered in protesting his innocence. The resulting conviction and sentence have troubled every Court which has reviewed his claims. Two justices of the Florida Supreme Court dissented from the affirmance of Mr. DARDEN's conviction because of the reprehensible arguments of the prosecutor. Darden v. State, 329 So.2d 287, 289 (Fla. 1976). This Court initially granted certiorari, then dismissed it as improvidently granted. See footnote 6, infra. The federal magistrate recommended that the conviction be reversed because of those same arguments (Appendix 01).

A split panel of the Eleventh Circuit denied relief while holding that the state's closing arguments were riddled with "tasteless and unprofessional" diatribes which "even the state candidly asserted no one has ever weakly suggested were anything but improper" and "would have been

reversible error in appeal from a Federal criminal case...." Darden v. Wainwright, 699 F.2d 1031, 1035 (11th Cir. 1983), quoting 513 F.Supp. at 952. The Eleventh Circuit then divided evenly, six (6) to six (6), 708 F 2d 648. Mr. DARDEN's death sentence was then vacated by the en banc Court on his Witherspoon claim, Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984). That decision was vacated and remanded for reconsideration in light of Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 1984. Wainwright v. Darden, 105 S.Ct. 1158 (1985). On remand, the en banc court reversed its decision in light of Witt, two Judges issued strong dissents on the Witherspoon and prosecutorial misconduct claims, and Judge Clark adhered to his belief that the prosecutor's arguments rendered the sentence proceeding fundamentally unfair, particularly in light of the tenuous evidence of Mr. DARDEN's guilt. Darden v. Wainwright, No. 81-5550 (11th Cir. Jul. 23, 1985) (en banc), (Clark dissenting), (Appendix 039).

It is against this backdrop of repeatedly expressed doubt of the validity of Petitioner's conviction and sentence by numerous jurists that Mr. DARDEN's forthcoming certiorari petition should be judged. To reiterate, the petition is from DARDEN's first federal habeas claims, a procedural posture recognized by the Court as significant in determining whether a stay should be granted to enable the Court to fully consider substantial constitutional claims. Barefoot v. Estelle, ___ U.S. ___, ___, 103 S.Ct. 3383, 3393-5, 75 L.Ed.2d ___ (1983). Mr. DARDEN recognizes certiorari from denial of an initial habeas petition does not require a stay be granted automatically as does certiorari from the direct appeal of a sentence of death. McDonald v. Missouri, ___ U.S. ___, 104 S.Ct. 567 (1984) (Powell, Circuit Justice). However, the fact Mr. DARDEN was in the midst of litigating his claim and had already been granted a stay when the state attempted to foreclose his opportunity for certiorari review is unquestionably a powerful circumstance favoring this court's grant of a stay pending the filing and disposition of certiorari. See Shaw v. Martin, 613 F.2d 487, (4th Cir. 1980), at 491, (Stay of execution granted so death-sentenced petitioner could pursue post-conviction "avenues of review so long and so well established that they must be counted among the basic 'protections' with which the judicial system has 'surrounded' all persons

convicted of crime." Id., quoting Evans v. Bennett, 440 U.S. 1301, 1303 (1979) (Rehnquist, J.)).

A stay of execution is authorized by 28 U.S.C. Section 2101(f) and 28 U.S.C. 1651 and Rule 44, Rules of the United States Supreme Court. The standard governing the issuance of a stay is settled. "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficient meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. ___, 103 S.Ct. at 3395 (1983) (citations omitted), accord Fare v. Michael C., 439 U.S. 1310 (1978) (Rehnquist, Circuit Justice). While the burden of persuasion as to these issues is on Petitioner, refusal of the Court of Appeals to grant the stay is no bar to this Court's grant of the stay. Heckler v. Lopez, 104 S.Ct. 10 (1984) (Rehnquist, Circuit Justice).

The balance of equities is clearly in favor of Mr. DARDEN since he will suffer the irreparable injury of execution if no stay is granted. See Gregg v. Georgia, 428 U.S. 1301 (1976) (Powell, Circuit Justice) (granting stay of mandate pending rehearing, holding, "If the executions in these cases were carried out before the petition for rehearing could be acted on by the court, the harm to Petitioner would obviously be irreparable."). The state's interest in denial of a stay is slight. Gregg, 428 U.S. at 1301. Mr. DARDEN has been in the custody of the State of Florida for twelve years, and a delay for the purpose of filing a certioruri petition injures no state interest. This is particularly so where the state acted in direct contravention of a stay under already in effect when it scheduled Mr. DARDEN's execution.

The information and materials necessary to make a careful assessment of the merits of the issues to be presented whereby the Court can reliably determine whether plenary review and a stay are warranted, Barefoot v. Estelle supra, 103 S.Ct. at 3395, are set forth below and separately filed in Petitioner's Appendix, as much as is practically possible under the state imposed rush to judgment.

III. BASIS FOR STAY OF EXECUTION

1.

THE PROSECUTOR'S CLOSING ARGUMENTS CREATED THE UNACCEPTABLE RISK THAT THE DEATH PENALTY MAY HAVE BEEN METED OUT ARBITRARILY, AND THE ELEVENTH CIRCUIT'S RESOLUTION OF THE ISSUE WAS INCORRECT AND IN CONFLICT WITH THIS COURT'S PRECEDENT

Petitioner's guilt of first-degree murder was a close jury question: The sole evidence of guilt was cross racial identifications.[1] The prosecutor's closing arguments came immediately after Petitioner had, in the words of the trial judge, "emotionally, and with what appeared on its face to be sincerity, proclaimed his innocence"[2] before the jury. It was

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[1] "The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye witness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony." Darden v. Wainwright, No. 79-566 Civ.T-H, opinion at 22 (M.D. Fla. April 10, 1981) (Magistrate's Report and Recommendation) (Appendix at 22), recommendation that writ issue based on prosecutorial misconduct rejected by district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

[2] The trial judge's sentencing order is reproduced in the Appendix at page 70. The court found that Petitioner's testimony and statements to the jury, and its apparent sincerity, was a mitigating circumstance. Cf. Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981) modified 677 F.2d 20, cert. denied, 459 U.S. 882 (1982):

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists...[T]he juror [or judge] entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death."

See also Heiney v. Florida, 105 S.Ct. 303,304 (1984) (Marshall and Brennan, J.J., dissenting from denial of certiorari on direct appeal):

> "This Court in Lockett and then more decisively in Eddings, held that any aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational — indeed, there is nothing novel — about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death, is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

in these guilt/innocence arguments that the state demanded the death penalty.[3]

The closing arguments were outrageous. They have been condemned by Respondent, and by every jurist who has examined them. Every court and judge (except the trial judge) has condemned the means, but no court majority has condemned the end -- conviction.[4] No majority of any court has directly examined the Eighth Amendment prejudice arising from the arguments, and the unreliability injected into the sensitive sentencing balancing process via the unprofessional and inflammatory prosecutor comments.[5]

Petitioner asks this Court to examine the arguments and determine whether Petitioner's life should be extinguished before he is provided the opportunity to present a petition for writ of certiorari to this Court, in which he will seek a determination of whether the effect of the argument on sentencing has been properly resolved. This request takes the following form in this section: (1) Petitioner will reproduce relevant parts of the arguments; (2) Petitioner will show that the arguments have been universally condemned; (3) Petitioner will outline the conflict requiring certiorari review; and (4) Petitioner will demonstrate that the arguments were

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[3]In the guilt/innocence argument "he was also making in effect, his principal argument in support of the dealth penalty." Darden v. Wainwright, 513 F.Supp. 947, 953 (M.D. Fla. 1981). Prosecutors' closing argument guilt/innocence ran for 45 pages of trial transcript. "[T]he prosecution made its sentencing argument at the guilt/innocence phase." Darden v. Wainwright, No. 81-5590 slip.op. at 1, n2 (11th Cir. August 27, 1985) (Clark, J., dissenting from denial of Petition for Rehearing) Closing argument at sentencing covered one page of transcript. 513 F.Supp. at 953.

[4]Many judges have been concerned about the effect of the closing argument on the jury's determination of guilt. Four judges would reverse the conviction, Darden v. State, 329 So.2d 287, 291, (Fla. 1976) (Sundberg, J. and England J., dissenting); Darden v. Wainwright, No. 79-566 Civ. T.-H (M.D.Fla. April 10, 1981) (Magistrate's Report and Recommendation) (See Appendix at 1); Darden v. Wainwright, 699 F.2d 1031, 1040 (11th Cir. 1983) (Clark, J., dissenting). At least four members of this court believed in 1976 that the prosecutorial argument was sufficiently troubling to vote to grant petitioner's writ of certiorari to the Supreme Court of Florida. See footnote 6, infra.

[5]Judge Clark, Eleventh Circuit Court of Appeals, is the only jurist who has explicitely examined the effect of the arguments on sentencing. He has thrice concluded that the arugments prejudicially infected the sentencing process. 699 F.2d at 1040; Darden v. Wainwright, No. 81-5590, slip.op. at 15, Appendix at 59; Darden v. Wainwright, N. 81-5590, slip.op, August 27, 1985, opinion dissenting from denial of Petition for Rehearing. See Appendix at 61.

prejudicial at sentencing, under any judicially accepted test for prejudice. A stay should be granted on this basis alone. However, Petitioner will further demonstrate that the court below applied at least the incorrect test for prejudice, and at most did not examine the issue of sentencing prejudice at all. Caldwell v. Mississippi requires that circuit courts at least examine the issue of prejudice vis-a-vis closing arguments, and the Caldwell test for prejudice must be applied. Neither an examination nor an application of Caldwell occurred.[6]

A. Outrageous Argument

The words require little comment:

> "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see [Willie Darden] sitting here with no face, blown away by a shotgun.... I wish someone had walked in the back door and blown his head off at that point. But he is lucky, the public unlucky, people are unlucky, it didn't happen."

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[6]This Court granted Mr. Darden's Petition for Writ of Certiorari to the Supreme Court of Florida in 1976, Darden v. Florida, 428 U.S. 917 (1976), and subsquently limited review to "whether the prosecution's summation to the jury in the circumstances of this case deprived the petitioner of due process of law." Darden v. Florida, 429 U.S. 1050 (1977). After briefing and oral argument, this Court dismissed the writ as having been improvidently granted, without comment. Darden v. Florida 439 U.S. 704 (1977).

Petitioner presented the prosecutorial argument to the federal district court in his petition, and the court ruled on the claim on its merits, correctly noting that this Court's dissmissal was not a prior federal adjudication. Darden v. Wainwright, 513 F.Supp. 947, 950 (M.D.Fla. 1981). A dismissal of writ of certiorari as improvidently granted may, however, indicate this Court's decision that there is no federal question involved, Benz v. New York State Thruway Authority, 369 U.S. 147 (1961), or that no federal question was presented to the state court. Newsome v. Smyth, 365 U.S. 604 (1961).

The state argued both these points in its brief before the Court in 1977. First, the state argued that the closing argument had not been "federalized" because it had been presented and argued in state court as a matter of state law. Brief of Respondent, pages 11-14. Second, Respondent argued that there was insufficient objection at trial, so the issue was not presented at all. Id., page 14-25.

To the extent these matters contributed to dismissal, they are no longer in contention. The federal claim has been presented on federal constitutional grounds and ruled upon on the merits without any finding of procedural bar. Darden v. Wainwright, 699 F.2d 1031, 1033-1037 (11th Cir. 1983). This Court frequently awaits the percolation and ripening of issues in the state and federal courts before granting or determining petitions for certiorari. See McCray v. New York, 103 S.Ct. 2438, 2439, (1983). ("[I]t is a sound exercise of discretion for the Court to allow the various states to serve as labortories in which the issue receives further study before it is addressed by this Court.") (Stevens, J., opinion respecting the denial of petition for writ of certiorari.) The procedural problems have

(Footnote Continued)

(R. 758-59)(emphasis added).[7] The state repeatedly expressed the wish that Petitioner had died (or would die) a violent death. Prosecutor McDaniel returned to this theme when he described the four times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Petitioner] didn't get a chance to use it. I wish he had used it on himself." (R. 775). He made a similar comment in describing an automobile accident Petitioner had: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (R. 775). Finally, while discussing the allegation that Appellant had shaved between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (R. 775).

In discussing the fact that Petitioner had been on furlough from prison at the time of the offense, the state argued:

> "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."

(R. 750). The state then begged for capital punishment by condemning the correctional system: "The second part of the trial I will request that you impose the death penalty. I will ask you to advise the court to give him death. That's the only way I know he is not going to get out in the public. It's the only way I know. It's the only way I can be sure of it. It's the only way anybody can be sure of it now...." (R. 753).

> As far as I am concerned...this animal was on the public for one reason. Because the Division of Corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749).

> I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would

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(Footnote Continued)
disappeared, and the substantive issue has ripened, in light of Caldwell v. Mississippi.

[7] While superfluous, Petitioner notes that the American Bar Association's Standing Committee on Standards for Criminal Justice "has promulgated useful guidelines," United States v. Young, 470 U.S. ___, 84 L.Ed 2d 1,8 (1985), for proper restriction on prosecutor comments. The above argument violently violates the most axiomatic restriction: "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice 3-5.8 (c) (2nd Ed. 1980) (hereinafter ABA Standards) See also Caldwell v. Mississippi, 105 S.Ct. 2633, 2642, n.6 (1985).

> have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 749-50).
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (R.765).

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you." (R. 781).[8]

The personal beliefs and opinions of the prosecutors permeated the arguments. The first prosecutor's argument by Mr. White, concluded with:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (R. 748).[9]

Both of the state's closing arguments contained such statements of personal belief and opinion.

These short excerpts from the closing arguments demonstrate that there were not "a few brief [improper] sentences in the prosecutor's long . . . closing argument, Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), but rather a driving diabolical diatribe that was "quite focused, unambiguous and strong." Caldwell, 105 S.Ct. 2633. The above-quoted arguments are merely illustrations of the prosecutors' outrageous misconduct.[10] Petitioner will show the prejudice from the arguments in section 1, B infra, and will there discuss additional improper prosecutor arguments.

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[8] The ABA Standards are again instructive: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequence of the jury's verdict." ABA Standards 3-5.8(d).

[9] Expressions of personal opinion are forbidden. "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." ABA Standards 3.89, see also Young, 84 L.Ed.2d 1, n.5.

[10] "Minor aberrations in a prolonged trial may be harmless," United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940), but pronounced (Footnote Continued)

B. Universally Condemned But So Far Ratified Arguments

Every court that has examined the prosecutor's arguments has condemned them. The state has wisely yielded: "No one has ever really suggested that McDaniel's closing remarks were anything but improper. . ." Respondent's Supplemental Answer, P. 12, quoted in Magistrate's Report and Recommendation, Appendix at 9. The following court comments illustrate that the arguments were fundamentally flawed.

The district court characterized the argument as a "tirade" containing "blatant expression of a personal opinion" and "a series of utterly tasteless and repulsive remarks" 513 F.Supp. at 953, 955:

> "Anyone attempting a text book illustration of a violation of the Code of Professional responsibility, Canon 7, EC 7-24 and DR 7-106(c)(4) could not possibly improve upon [the prosecutor's] example."

513 F. Supp at 955.[11] The majority panel decision in 1983, which is the en banc court's opinion,[12] similarly condemned the arguments "as tasteless and unprofessional," which "contained personal opinions," and "would have been reversible error on appeal from a federal criminal case." 699 F. 2d. 1031, 1035-36. Like the district court, however, the majority opinion concluded (without discussing the Eighth Amendment) that the arguments were harmless.[13]

C. Question for Certiorari--Whether the Eleventh Circuit is Bound by Caldwell

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(Footnote Continued)
and persistent misconduct is prejudicial. Berger v. United States, 295 U.S. 78 (1935).

[11] The court was specifically referring to the comment that the prosecutor was "convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer...I will be convinced of that the rest of my life."

[12] The Eleventh Circuit granted en banc consideration of the 2-1, 1983, panel decision, but then only discussed the Witherspoon issue. The prosecutorial misconduct issue was not addressed, as the court "conclude[d] that the panel's evaluation of these issues was correct and reinstate[d] the relevant portion of the panel's opinion, 699 F.2d at 1033-37." 725 F.2d 1526, 1532. The court found Witherspoon error, and the prosecutorial issue received short shrift. This Court granted certiorari and vacated the Witherspoon reversal in light of Witt. The Witherspoon/Witt issue was the only issued addressed in the 10-2 en banc decision upon remand.

[13] Even the majority opinion in the Florida Supreme Court recognized that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility..." 329 So.2d at 290.

This case presents a question of fundamental importance to the proper administration of the death penalty in Florida, Georgia, Alabama, and throughout the country. More importantly, the case involves whether Mr. Darden has received any, much less correct, treatment of his claim that the prosecutors' arguments destroyed the possibility of a reliable determination of sentence in his specific case.

The standards for analysis of whether constitutional error is, or can be, harmless in criminal proceedings has received the fine-tuned attention of this Court since the 2-1 panel decision in this case. See, e.g., United States v. Bagley, 105 S.Ct. 3375 (1985); Strickland v. Washington, 104 S.Ct. 2052 (1984). The effect of prosecutions misconduct in a sentencing case was addressed just ten weeks ago in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), and the issue of improper prosecution argument in a non-capital case was addressed in United States v. Young, 105 S.Ct. 1038 (1984).

The Eleventh Circuit is in turmoil over whether its en banc decisions in Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985), Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985), Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) and Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), comport with the requirements of Caldwell. The Brooks line of cases barely predates Caldwell, and this Court will ultimately receive timely and unhurried certiorari petitions from petitioners in those cases. Petitioner here, however, must present a hastily drawn prayer for stay, and attempt to presage this Court's future determination (in Brooks and companion cases) of the propriety of the Eleventh Circuit's analysis.

The substantive conflict between Caldwell and Brooks is readily apparent: Caldwell requires resentencing after prosecutorial misconduct, unless the state demonstrates the argument "had no effect on the sentencing decision," 105 S. Ct. 2646; Brooks requires resentencing only if there is "a reasonable probability that, but for those arguments, the death penalty would not have been given." 762 F.2d. at 1413. The Brooks adoption and application of a Strickland v. Washington[14] prejudice standard is at odds

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[14]The Brooks court decided that Strickland v. Washington, 104 S.Ct. (Footnote Continued)

with Caldwell: the court admitted in Brooks that "[a]lthough we cannot conclude that these few improper remarks had no prejudicial effect on the jury, we are satisfied that the prejudice was not severe." Brooks, 762 f.2d. at 1415. If it cannot be said that there was "no prejudicial effect," the Eighth Amendment requires resentencing. Caldwell.

The conflict arose in this manner. On May 31, 1985, the Eleventh Circuit released its en banc decisions in Brooks, Drake, (W.B.), Tucker and (R) Tucker. Brooks was the lead case, and the Strickland prejudice test adopted controlled all four cases. This Court decided Caldwell 11 days later, recognizing that Eighth Amendment considerations prevent the state from creating an unacceptable risk that '"the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake.'" 105 S. Ct. at 2647 (O'Connor, J., concurring) (quoting California v. Ramos, 463 U.S. 992, 999 (1983). Petitions for rehearing were subsequently filed in (W.B.) Tucker and Brooks, and those petitions urged the en banc court to reconsider in light of Caldwell.

Rehearing was denied. However, three members of the en banc court dissented from denial of rehearing in both cases. In identical language in both dissents, the judge's stressed that "[t]he majority's use of the Strickland v. Washington, _____ U.S. _____, 104 S. Ct. 2052, 80 L.Ed. 7d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in direct conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 Ct.S. L.W. 4743 (June 11, 1985)." Brooks v. Kemp, No. 83-8028 (11th Circuit, July 23, 1985) (Clark, Krawitch, and Johnson, J.J., dissenting from denial of Petition for Rehearing) (photocopy contained in Appendix at 72, filed herewith); W.B. Tucker vs. Kemp, No. 83-8137 (11th Circuit July 23, 1985) (Clark, Kravitz, and Johnson, J.J.,

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(Footnote Continued)
2052 (1984) provided the proper prejudice standard when deciding whether "fundamental fairness" under Donnelly v. DeChristoforo, 416 U.S. 637 (1974), requires reversal of a capital sentence possibly tainted by prosecutorial misconduct. Thus, a Petition under Donnelly/Strickland must prove that there is a reasonable probability that "but for those arguments, the death penalty would not have been given." 762 F.2d at 1413. The Brooks standard was used to deny relief in Brooks, and the companion cases.

dissenting from denial of Petition for Rehearing) (photocopy contained in Appendix at 76, filed herewith).

On August 6, 1985, the conflict grew. In Bowen v. Kemp, No. 84-8327 (11th Cir. 1985) (photocopy contained in Appendix at 79), a panel of the Eleventh Circuit again split on the Caldwell/Brooks issues. The two judge majority discussed a prosecutorial misconduct issue in pure Brooks/Strickland language, without even acknowledging the existence of this Court's Caldwell decision. The dissent applied Caldwell. ("Because the recent Supreme Court decision rejects the 'prejudice' test adopted in Brooks, I dissent...." Bowen v. Kemp, No. 84-0327 (11th Cir. August 6, 1985) (Johnson, J., dissenting) (see Appendix at 118).

The Eleventh Circuit decided Mr. Darden's case July 23, 1985. The majority opinion addressed only the Witherspoon/Witt issue. The 1983 panel 2-1 decision, which did address the prosecutional argument issue, is thus the Eleventh Circuit's only opinion on the prejudicial argument in Mr. Darden's case, and how prejudice is to be analyzed. 513 F. Supp. 947. In light of the substantial judicial activity in this court, Caldwell, Young, Strickland, and in the Eleventh Circuit, Brooks, with regard to the proper prejudice standard, Petitioner requested rehearing on the closing argument issue. The following order was entered:

> "At the request of one of the members of the en banc court, the court has been polled on the petition for rehearing addressed to the en banc court. Less than a majority of the judges in regular active service have voted in favor of the petition. The petition for rehearing is, therefore, denied."

Darden v. Wainwright, No. 81-5590 (11th Cir. August 27, 1985) (see Appendix at 13). In dissent, Judge Clark noted that "it would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The argument is as egregious as any." Id. Rehearing was required by Judge Clark "to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using either [prejudice standard], however, Darden is entitled to relief." Appendix at 65.

Thus, Petitioner comes before this Court on a first writ request for stay so as to be afforded the opportunity to prepare and present a petition for writ of certiorari addressing a question of profound significance about which reasonable jurists have consistently disagreed. The instant tension

is between Caldwell and Brooks, but even before the Caldwell decision, the courts that addressed Petitioner's claim split over the issue of prejudice from the closing argument herein.

Petitioner would like the opportunity to demonstrate that he can prevail under any prejudice standard, but that the State of Florida has scheduled his death before the rules of this Court require his application for certiorari to be filed. Thus, he will present his truncated and hurried demonstration here, to save his life, rather than when he should be allowed to, in a proper, judicious setting.

D. Question for Certiorari--Whether the Prosecutor's Closing Arguments Were Prejudicial at Sentencing.

The prejudice to Petitioner can only be evaluated upon a complete analysis of the facts of the case. The magistrate below, the dissent in the 2-1 panel decision, and two members of the Florida Supreme Court believed the evidence was sufficiently weak for the prejudicial closing argument to have provided the difference between guilt and innocence.

The potential for prejudice was great.

> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The state has failed to demonstrate, beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions.

Magistrate Report and Recommendation; App., p. 22-23.

1. Facts Upon Which Conviction and Sentence Were Based

a. Testimonial Facts

> "The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. Can each of you tell me that you can try Mr. Darden as if he was white?"
>
> [C]an you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black, can you try him as if he was white?

(R. 57; 115: State's voir dire).

The state's transparent benevolence during the early stages of Petitioner's trial was soon replaced by explicit mean spiritedness: "He

shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash"; "I wish that I could see [Appellant] sitting here with no face, blown away by a shotgun. . . ." R. 750, 758-59 (closing argument). The majority of the Florida Supreme Court believed that "overwhelming eyewitness and circumstantial evidence" supported the guilt determination, blunting the prejudicial impact of the prosecutors' closing arguments. The dissent disagreed, being unconvinced that the argument "did not contribute to . . .defendant's conviction." Darden, 329 So.2d at 295.

The Florida Supreme Court majority recited the "facts" underlying Petitioner's conviction:

> Carl's Furniture Store in Lakeland, Florida, was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery and assault with intent to commit rape....
>
> Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Turman, the decedent's wife, who was present and assaulted during the commission of the robbery and murder.

Id. at 288 (emphasis added).

The eyewitness identifications at trial were indeed damaging to Petitioner, but they were in fact anything but conclusive. The identifications occurred in the following manner. First, with respect to Mrs. Turman, she told officers immediately after the offense that "she could not remember what the subject looked like or what he was wearing." See police report, Appendix page 132; see also R. 232, 236. However, a few days later, the day after her husband's funeral, Mrs. Turman was asked to come to a preliminary hearing. She was the sole witness. (R. 46). She was in a state of shock. (R. 257-58).

Mrs. Turman was taken to a tiny courtroom with one black male sitting at defense table. (R. 221). The prosecutor walked over to Petitioner, pointed at him, and said, "Is that the man that did it?" (H.C. 151, Appendix p. 133):

THE COURT: Ask her to identify.
Mr. MARS: Yes sir.
Q. Can you see this man sitting here?
[objection overruled]
Q. Is this the man that shot your husband?
A. Yes, sir.

(R. 49-50). As will be seen, her descriptions of the assailant at trial lent no credence to her prompted identification.

Mr. Arnold provided the second identification. He had seen the assailant very briefly before he himself was shot. Several days after the incident, while Mr. Arnold was still in the hospital with his mouth wired shut, police showed him six photographs. As Mr. Arnold testified, the purpose of looking at the photographs was "[t]o identify the person that shot me and Mr. Turman." (R. 448). He immediately excluded four of the photographs, which "just didn't look like him at all." (R. 449). He then wrote on a piece of paper the following information:

"Both of these two look a little like him!"
DID HE HAVE A MUSTACHE?
"I don't think so!"
WHAT TYPE SHIRT WAS HE WEARING?
"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

(R. 455, 475, Appendix p. 134).

Mr. Arnold then picked out of the two photographs that looked "a little like him," the only one which had a name: Petitioner's photograph bore a white tag which revealed his name, "Darden." (R. 453, 477). At trial, Mr. Arnold could not remember the day he looked at the photographs, said the array was viewed in the afternoon when in fact it had occurred in the morning, and stated that none of the photographs had had names on them.

These are the identifications that convicted Petitioner. The tenuousness of these identifications, and the general unreliability of the identifiers' testimony, is illustrated by subsequent trial testimony.

The testimonial descriptions of the man who shot Mr. Turman and the man who wrecked his automobile several miles down the road are consistently inconsistent. Mrs. Turman emphasized that the man who came in the store that day and robbed her was very clean shaven. (R. 225, 237). James Stone, who witnessed the wreck on Highway 92 which allegedly occurred after the killing, and who stopped to see if he could help, testified that Willie Darden had a gray moustache that day (R. 318). Phillip Arnold, who admittedly only saw the man for 20-25 seconds (R. 494) and even during that

period was not keeping his eyes on the man every minute (R. 497), in his pretrial deposition indicated that the man who shot him had no hair on his face (R. 498), but at trial, after Mr. Stone gave his testimony, couldn't say for sure whether or not the man had a moustache because "it was a very thin one" (R. 497). Arnold also indicated that the man had an unusually long face (R. 443): Mrs. Turman testified that the man's face was the type of fat face consistent with a heavy-set person (R. 237).

The various descriptions given by Mrs. Turman are internally inconsistent and confused: she initially told one of the investigating officers that it would be hard for her to identify the man because she was scared to look while the crime was in progress and at one point covered her face with her hands so she would not have to see (R. 240, 280). She told that same officer that the man was the same height as herself, 5'6" (R. 288). In her pretrial deposition, she testified that the man was 5'8", "maybe" 6' (R. 256). Phillip Arnold testified that the man was very close to his own height, 6'2" (R. 495). When Mrs. Turman gave her initial description to Deputy Neill, she could not remember whether or not the man wore glasses (R. 227), but at trial she was adamant in her recollection that the man was definitely not wearing glasses (R. 227, 235).

The various descriptions of the clothes worn by the man who shot Mr. Turman and the man who wrecked his car on Highway 92 are equally conflicting. Mrs. Turman could not remember the color of the shirt worn by the man in the store, but was sure that it was a pullover, a T-shirt, with a stripe around the neck and bottom (R. 227). Phillip Arnold testified that the man was wearing a dull-colored knit shirt with a ring around the collar (R. 443). Mr. Stone testified that when Willie Darden got out of his car after the wreck, he was wearing a plain white shirt with buttons down the front, which were open, and which he took off after he got out of the car (R. 313).

The only physical characteristic which every witness who saw both men could agree on was that they were "colored." The testimony of Officer Neill, who ultimately arrested Mr. Darden in Tampa, is particularly telling: when asked if the man he arrested, Mr. Darden, fit the physical description given by Mrs. Turman of the man who killed her husband, Neill replied "Yes. The dark-colored automobile, the time element, the car crash

. . . just lead me to believe this possibly was him" (pretrial hearing of 1/9/73, p. 82). It is clear that this "physical description" given by Mrs. Turman would have fit any black man unfortunate enough to have been anywhere near the scene in Lakeland that day.

The various descriptions of the car seen at or leaving the scene of the crime were even more conflicting than the multitudinous physical descriptions of the perpetrator. Mrs. Turman told Officer Neill at the scene that she saw a black car (R. 272). Mrs. Hill, a neighbor who came out of her house after hearing shots, saw a green car leaving the scene (R. 299). Deputy Elliot, one of the first officers to report to the scene, testified that a Mr. Douglas, who had witnessed the wreck in front of the Lakeland Lounge on Highway 92, told him that the car involved in the wreck was maroon (pretrial hearing of 1/9/74, p. 34). Elliot also testified that several unidentified witnesses who were on the scene when he arrived told him that the suspect had left in a maroon car (Id). While there are certain colors which, depending on their intensity and value, are easily confused with each other, particularly from a distance, green and maroon occupy opposite ends of the color spectrum and are too distinctive to be confused. Deputy Al Brady, who responded to the accident scene, impounded the car, and later examined it, testified that the car which ran off the road in front of the Lakeland Lounge was greenish-gold in color (R. 426). It seems apparent that any car driven through the area by a 'colored' man at the appropriate time would have fit the description.

The only other evidence even remotely connecting Petitioner to the scene was a pistol found submerged in water thirty-nine feet from where Petitioner wrecked his automobile. So remote was this pistol that this Court did not mention it. It could not be connected to the offense (R. 347). No fingerprints, blood samples, confessions or any other evidence was presented.

Petitioner testified as the only witness for the defense. He admitted he was on furlough from prison, and was driving his girlfriend's car in Lakeland shortly after 4:00 p.m. on September 8, 1973, when his car broke down (R. 571). Two police officers helped him push the car out of the street and a woman who lived nearby, Mrs. Christine Bass, called two service stations for him but to no avail (R. 573). Finally, however,

Mr. Lawhorn came out of the real estate office in whose parking lot Appellant was stranded, and helped Mr. Darden fix the car's broken battery cable (R. 575).

Petitioner continued on his way, but a short time later had more car trouble which required stopping at a service station (R. 574). These delays put Petitioner behind schedule, as he was to attend a wedding that evening in Tampa (R. 575).

In his haste, Petitioner was apparently driving too fast and ran his vehicle off the rainy highway (R. 576). After he was arrested, Petitioner requested a lie detector test and a lineup (R. 590-591, 653-657). He denied any involvement in the incident at the Turmans' business (R. 593, 598).

On cross-examination, he described in great detail his activities during the early part of the day on September 8, 1973 (R. 610-619). He explained that a man named Roy had paid him ten dollars to take him to Lakeland, Florida, between 3:30 p.m. and 3:45 p.m. (R. 614-617). It was during Petitioner's return to Tampa that he twice had car trouble and eventually was involved in an accident (R. 619, 624, 634). He estimated that he had left Lakeland at 5:30 p.m. and concluded that the accident occurred a few minutes before 6:00 p.m. (R. 640). He arrived at his girlfriend's house before 6:45 p.m. (R. 64).

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended in overwhelming measure upon the jury's acceptance of the identification testimony of the state's two principal witnesses, and upon juror rejection of Petitioner's testimony. With this uncertainty, the summations to the jury took on particular importance.

b. Closing Argument "Facts"

The state's argument at guilt/innocence contained little if any relevant guilt/innocence issues. The crucial guilt/innocence issue, identification, was quickly dispatched.

The state had early on set up its argument. During voir dire (after asking the jury if they would promise to treat Petitioner "just like a white person), the state asked potential jurors if they would disregard the knee-jerk reaction that "they all look alike to me.":

> [D]id you hold to the old wives tale that all blacks look alike? Do any of you believe that?

(R. 114). The state sprung this trap later in closing:

> Ladies and gentlemen, that's eyewitnesses. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

(R. 747) (emphasis added).

The state's non-record and unsupportable assertions of the efficacy of eyewitness testimony were inherently prejudicial. Eyewitness testimony is roundly criticized as bad, and cross-racial identification, as here, is the worst. Barkowitz, P., and Brigham, J., Recognition of Faces: Own Race Bias, Incentive, and Time Delay, 12 Journal of Applied Social Psychology, 4:255 (1982); Brigham, J., and Maass, A., Accuracy of Eyewitness Identifications in a Field Setting, 42 Journal of Personality and Social Psychology 673 (1982). Having shored up its own case, the state proceeded to crack Petitioner's credibility through a litany of totally irrelevant arguments.

1. Convict/execute Petitioner because of incompetence of correctional personnel

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at length that the jurors should not limit themselves to consideration of Appellant's guilt or innocence of the crimes charged in the indictment, but should convict and execute him because the state Division of Corrections, which had authorized Appellant's weekend furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another defendant in this corutroom...and that is the Division of Corrections, the prisons" (R. 749). He continued:

> As far as I am concerned...this animal was on the public for one reason. Because the Division of Corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749).

> I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].

> Yes, there is another defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 749-50).
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections." (R. 765).

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you." (R. 781).

These inflammatory comments bore no rational relationship to the question of Petitioner's guilt or innocence of the crimes with which he was charged in the indictment, and did not relate to punishment. The purpose for the diatribe was singular: execute Petitioner because incompetent correctional officials will "let him loose." Death is "the only way that I know that he is not going to get out on the public. It's the only way I know." (R. 753).

2. Prosecutors' opinions/beliefs

Both prosecutors also engaged in blatantly improper argument by placing in issue their own opinions and beliefs and those of their office. Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life (R. 748).

Mr. McDaniel repeatedly offered the jury his opinion that Petitioner was not a man worthy of belief. Since Petitioner's defense consisted solely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's statements included the following:

a. Petitioner testified that he had asked for a lie detector test. In discussing that testimony, McDaniel said: "I don't believe anything he says...." (R. 770).

b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something. If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." (R. 755).

c. Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (R. 769).

d. Petitioner testified that he stopped at a service station after his automobile accident seeking assistance--testimony that was confirmed by one of the state's own witnesses. Yet McDaniel recounted Petitioner's testimony and said: "That's what he says. I don't know that he stopped at any . . . I guarantee you he was not going back to the scene of the accident until he had gotten home." (R. 765).

3. Prosecutorial expertise

The prosecutors informed the jury that they knew a lot more about what was going on than the jury; that, based upon their expertise, eyewitness identification cases were "the best;" that the defense was using age-old tricks taught them by the very prosecutor speaking, who had been a defense lawyer for seven years, and that generally the jury could rely on the state for knowledge and truth. For instance:

> The Defense Attorneys, which I am proud to say that I was about seven years.... (R. 756).
>
> [The defense attorney] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago. (R. 749).
>
> Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness (R. 747).
>
> I don't know how they're going to get around this (R. 757) (eyewitness identification).

Of particular note is the prosecutor's explaining to the jury that Petitioner testified the way he did because he was able to hear all the state's witnesses who preceded him:

> You couldn't hear Mr. Darden until yesterday, after he heard all of the oth~ witnesses (R. 767).
>
> But he [Petitioner] heard every word everybody said and I assure you, if we hadn't been able to prove the accident, they would never had admitted it." (R. 764).

The prosecutor's patriarchal attitude surfaces throughout the argument, and the jury was constantly reminded to look to the state for the truth: "I

want to thank you for your time. I assure you that it was necessary under the circumstances." (R. 749).

4. Improper appeal to emotions

The state voiced contempt and hatred for Petitioner, and urged the jury to do the same. The jabs began early in the summation: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." (R. 750). The state never let up.

McDaniel's repeated expression during summation of his wish that Petitioner had been maimed or killed further contributed to the denial of Petitioner's constitutional right to a fair trial. Over and over again, the prosecutor made comments like the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [Appellant] sitting here with no face, blown away by a shotgun, but he didn't.... I wish someone had walked in the back door and blown his head off at that point." (R. 125-56).

McDaniel returned to this theme when he described the four times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Petitioner] didn't get a chance to use it. I wish he had used it on himself." (R. 133). He made a similar comment in describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (R. 134). Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (R. 136).

2. Facts at Sentencing

a. Evidence at Sentencing

The only additional evidence at sentencing was a statement by Petitioner. First, the trial judge recounted for the jury a conversation had in their absence:

> We have talked with Mr. Darden.... He has advised me that he told you already all he knew about this case on his testimony before. That you did not choose to accept his testimony, that he is presently emotionally upset, he does not know anything else that he could add....

(R. 892). Later, Mr. Darden did make a statement to the jury:

> I have never in my life carried a gun or a knife or any other type of weapon on my person.

> I have never in my life shot no one or robbed anyone. When I took that stand yesterday, I had nothing to hide from you peoples. I don't have anything to hide from you today.
>
> I have told you the truth so help me God. . . .

(R. 906).

This question of innocence was fundamentally important at sentencing. Including testimony, Petitioner spoke to the jury three times, professing his innocence. The trial judge found his exculpatory testimony to be a mitigating circumstance:

> "In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.
>
> * * *
>
> In mitigation, I find the following mitigating circumstances: . . . The defendant repeatedly professed his complete innocence of the charges."

Appendix at 71. The sentencing judge also considered the fact that Defendant was married and had seven children to be a mitigating circumstance. Id.

3. The Sentencing Determination Was Prejudically Infected by Closing Argument.

Petitioner believes that the closing arguments were prejudicial under any test. The prosecutors broke every single rule designed to ensure a fair trial. It seems quite simply surperfluous to discuss prejudice in this case. Reversal should be immediate.[15]

However, Petitioner will discuss the various tests for prejudice, inasmuch as prejudice is readily apparent. First, however, Petitioner will discuss the appropriate test for prejudice.

a. Caldwell v. Mississippi prejudice

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the prosecutor (and judge) had informed the jury that their decision on death was subject to appellate review: "your decision is not the final decision . . . [y]our job is reviewable." 105 S.Ct. at 2646 (O'Connor, J., concurring). In

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15 It is extraordinary that no majority decision has directly addressed the effect of the argument at sentencing, in light of the fact that Petitioner has repeatedly argued the claim. See, e.g. Petition for Rehearing and Rehearing en banc, p. 4, filed March 10, 1983; Initial Brief of Appellant to the Eleventh Circuit, p. 18, filed January 14, 1982; Brief of Petitioner to the District Court; filed November 7, 1979; Petition for Rehearing, filed with the En Banc court, filed August 23, 1985.

fact, the jurors' decision in Mississippi is presumed correct on appeal, and is thus not subject to ab initio review.

Caldwell argued that "[t]he remarks at issue here divert the jury from focusing on the constitutionally mandated factors relating to the nature of the crime and the background and characteristics of the individual offender." Appellants brief, p. 27. He specifically directed this Court to Eighth, not Fourteenth Amendment, law to resolve the issue:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> Woodson v. North Carolina, 428 W.S. 280, 304, 96 S.Ct. 2978, 2990-2991 (1976) (plurality opinion).
>
> See also, Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 874 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965 (1978) (plurality opinion); Roberts (Harris) v. Louisiana, 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995 (1977); Gregg v. Georgia, supra, 428 U.S. 153, 197, 96 S.Ct. 2909, 2966 (plurality opinion); Proffit v. Florida, 428 U.S. 242, 251-252, 96 S.Ct. 2966 (1976) (plurality opinion).
>
> The remarks by the prosecutor diverted the jury from meting out the "unique, individualized judgment regarding the punishment that a particular person deserves," Zant v. Stephens, supra, U.S. ___, 103 S.Ct. at 2755 (concurring opinion, Rehnquist, J.). The sentence should be reversed.

Appellant's brief, p. 28.

Respondent, State of Mississippi, directed the Court to "fundamental fairness" due process considerations, and argued that review in this Court was restricted to alleged error which "so infected the trial with unfairness so as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Resp. brief, pages 23-24. Respondent in Caldwell cautioned this Court that "not every trial error or infirmity which might on direct appeal of a federal conviction call for an application of a federal appellate court's . . . supervisory powers correspondingly constitutes the denial of due process." Resp. brief, p. 25.

This Court responded to Donnelly, and embraced Caldwell's Eighth Amendment argument. In so doing, the Court placed a reliability gloss on the restrictive Donnelly rule in capital cases. The Court first underscored that Donnelly "does not insulate all prosecutorial comments

from federal constitutional objections." 105 S.Ct. at 2644. After distinguishing the Donnelly facts, this Court held that "[b]ecause we cannot say that his [argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646.

Thus under Caldwell, improper prosecutorial comments render a sentencing proceeding fundamentally unfair (per Donnelly) when the comments cannot be said to have had no effect on the delicate and individualized sentencing process.

The State herein repeatedly argued at trial that this "animal" should be sentenced to death because the Department of Corrections could not be trusted to keep him in prison. The State wanted Petitioner to die a violent death as soon as possible, and graphically urged the jury to make that task possible. It is impossible to read the closing arguments without concluding they had some effect on sentencing.[16]

The argument is not saved by the fact that in Florida the jury recommends punishment, and it is the trial judge's obligation to impose it. Under Florida law, a trial judge must follow the jury recommendation "unless the facts suggesting [a different sentence] are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). "A jury recommendation under our trifucated death penalty statute should be given great weight." Id at 910.

No court majority has expressly examined the arguments to determine whether they "affected" in any way the death sentence. A stay should be granted so that the issue can be addressed.

b. Donnelly / Strickland Prejudice.

In Donnelly, closing arguments did not render the trial (guilt/innocence) fundamentally unfair because 1) the trial judge agreed that the remarks were improper, and gave a strong curative instruction, 2) the prosecutor's comments were ambiguous, and 3) the argument did not

---

[16] The circuits court's rejection of Petitioner's claim through application of a higher standard is thus improper. See text, section 1, a, supra.

prejudice a specific constitutional right. Caldwell, 105 S.Ct. at 2633. No such saving factors exist in Petitioner's case, just the opposite.

First, as in Caldwell, "[t]he trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them." Id. at 2645. After the prosecutor at trial made one of his tasteless comments wishing that Mr.Darden was dead ("The only thing he hasn't done that I know of is cut his throat." R. 779), counsel objected. The trial court stated: "Objection will be overruled. Go ahead, sir." (R. 780). Again, as in Caldwell, the trial judge effectively "stated to the jury that the remarks were proper," 105 S.Ct. at 2645, and, unlike Donnelly, no curative instruction was given.

Second, the closing argument here contained no ambiguity. "[T]he prosecutor's remarks were quite focused, unambiguous, and strong." 105 S.Ct. at 2645. The diatribe by the prosecutors here was capable of no other interpretation than that the State hated and despised Petitioner, wished they could see him with his face blown away, believed the Department of Corrections' personnel who allowed him a furlough should be killed, and knew that if Petitioner was not killed by the jury's vote, the Department of Corrections would let this "animal" out again:

> [T]his animal was on the public for one reason. Because the division of corrections turned him loose, let him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking.
>
> * * *
>
> I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth.
>
> * * *
>
> Mr. Turman is dead because that unknown defendant we don't have in the corrections (division of corrections) allowed it.

(R. 749-50). These are just a few of the arguments. More are reproduced elsewhere. The entire argument was objectionable.

Finally, the argument intentionally implicated Petitioner's constitutional rights---his right under the Eighth Amendment to "an individualized determination" of sentence. Zant v. Stephens, 103 S.Ct. 2733, 2743 (1983). The State's demands directed the jury away from the proper considerations at sentencing and urged extraneous factors (hatred,

complaints against the Department of Corrections, desire to see Petitioner with his face blown off and his throat slit, placed on a leash, etc.). These arguments are insidious. They accomplish nothing except assuring that the death penalty is meted out arbitrarily and "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 102 S.Ct. at 878 (O'Connor, J., concurring) (emphasis added).

The prosecutor's incindiary argument, tossed into the powder keg of a black/white killing, with sexual advances on the victim's widow, did nothing but fog sentencing issues at least, and at most whipped the jury into a lynching frenzy, the antithesis of Eighth Amendment jurisprudence. It actually affected the death verdict, there is a "reasonable probability" that it did, and it cannot be said that it had "no effect." Under Donnelly, Strickland, Caldwell, Brooks, or under any currently uncharted prejudice criteria, this argument cannot be the predicate for death. See Magistrate's Report and Recommendation ("I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument." App. 23).

2.

OPPOSITION TO CAPITAL PUNISHMENT
CANNOT ALONE DISQUALIFY PEOPLE
FROM SERVING AS JURORS IN CAPITAL CASES

Appellant in good faith believes that the 10-2 en banc decision is in direct conflict with Wainwright v. Witt, 105 S.Ct. 844 (1985); that the Court below overlooked or misinterpreted important facts from the record; and that the Court's decision involves a question of exceptional importance to death sentenced inmates, and their constitutional right to prevent the selection of a jury "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 512 (1968). A stay should issue so that the issue can be fully presented.

The issues involved are simple; the ramifications deadly. First, may a defendant have jurors hear his case who are opposed to capital punishment, if they will nevertheless perform the duties imposed by their oath and conscientiously apply the law to the facts. Witt says "yes". 105 S.Ct. at 850-51. Second, how must the determination of eligibility be made, and what deference is due the state court's determination? Witt says that the trial judge is best suited to make the determination, the judge

should excuse jurors who leave the definite impression that their views would substantially impair the performance of juror duties, and that the decision is entitled to deference, absent an exception to Section 2254(d).

The problem with juror Murphy is that he was never provided the opportunity to address the "performance of duties" question:

> "Do you have any moral ... religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"
>
> Mr. Murphy: "Yes, I have."

Venireman Murphy was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked whether, if the circumstances were sufficiently strong and aggravating, he could nevertheless vote to recommend the death penalty. Mr. Murphy was never questioned regarding his ability to abide by the instructions of the court in resolving his conflicting values. See, Patton v. Yount, 467 U.S. ___, 104 S.Ct. 2885, at 2891 (1984).

The record further reflects the judge's intent to excuse any potential juror who, through willing "to follow [the law], would be going against his principle." (Vol. III - 18) By affirming this juror's excusal, the Eleventh Circuit has emasculated Witt and Witherspoon.

Under Darden, the only question now is: are you against capital punishment. That ends the inquiry, pursuant to the per curiam decision, because, naturally, one opposed to capital punishment would have to violate his or her principles in order to vote for it. That is not enough for excusal under Witt.

Having come to the conclusion that it is enough, the per curiam opinion's resolution of this case is of course unassailable. Either the judge must ask, "could you put aside your beliefs," or not. The Eleventh Circuit says not, Witt says otherwise - "jurors who, though opposed to capital punishment, will nevertheless conscientiously "apply the law" are competent. Witt 105 S.Ct. at 850.

Appellant believes the remand was to apply Witt. The proper application is this: Mr. Murphy was not asked whether he could apply the law.

which is the correct legal standard. Since he was not, no presumption of correctness attaches.

The per curiam finds two "record" facts in support of the judge's excusal, seeking refuge in Witt. First, that the trial judge could observe demeanor, as in Witt. There was, however a much greater opportunity for "credibility" determinations in Witt: there was a colloquy:

> "[Q. prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> "[A. Colby:] I am afraid personally but not -
>
> "[Q]: Speak up, please.
>
> "[A]: I am afraid of being a little personal, but definitely not religious.
>
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
>
> "[A]: I am afraid it would.
>
> "[Q]: You are afraid it would?
>
> "[A]: Yes, sir.
>
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> "[A]: I think so.
>
> "[Q]: You think it would.
>
> "[A]: I think it would.
>
> "[Q]: Your honor, I would move for cause at this point.
>
> "THE COURT: All right. Step down."

Tr. 266-267. In contrast here there was one question. The second factor cited is that there was no objection to the excusal. There was, in fact, a continuing objection, allowed by the trial court. R. Vol. I, p. 106; R. Vol. III, 19.

Murphy opposed capital punishment. Appellant was entitled to have him serve.

3.

DEFENSE COUNSEL CONDUCTED NO INVESTIGATION FOR, AND PRODUCED NO EVIDENCE AT, SENTENCING, BECAUSE OF COUNSEL'S MISTAKEN BELIEF THAT THE FLORIDA STATUTE LIMITED EVIDENCE IN MITIGATION, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The post-Furman Florida death penalty statute came into effect thirteen months before Petitioner's trial. His was the first capital trial in the circuit under the statute.

Petitioner was represented at trial by an attorney, Mr. Maloney, who had been licensed for four months, and who had never seen, much less tried, a capital case. (H.C. 132, 141). Co-counsel was Mr. McDaniel, who had never tried a capital case. (H.C. 141).

In preparation for sentencing, the attorneys decided to offer no evidence in mitigation: "That decision was made after a perusal of the mitigating circumstances in the Florida Statute 921.141. And we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances." (H.C. 154). Mr. Maloney further explained the "perusal":

> We were operating on the premise at that time that we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissable.
>
> Something should have been offered in mitigation. In any capital case such as this, something can be offered in mitigation.
>
> Q. Would it be fair to say that you and co- counsel were using 921.141 -- I believe it's subsection B, Mitigating Cicumstances -- as being a closed shop? That that was all you could consider in the way of mitigating circumstances and nothing outside the four corners of the statute?
>
> A. Until the Supreme Court ruled in

> Gardner v. Florida, that was my opinion. And Gardner v. Florida considerably postdated this trial.
>
> Q. Okay. But that was what you were all thinking on that day --
>
> A. Yes, sir.
>
> Q. -- on January 19th, 1974.
>
> A. Yes, sir.
>
> * * * *
>
> A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

(H.C. 154-55). Maloney learned he was wrong after Lockett: "Lockett is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." (H.C. 178).

Co-counsel McDonald felt similarly limited (H.C. 337), as did the chief public defender, who testified below, but who did not participate at trial. The following colloquy occurred between the magistrate below and the chief public defender:

> Q. And in connection with the penalty phase, was Mr. Darden consulted or advised or prepared for his testimony at the penalty phase?
>
> A. I think he was, your honor.
>
> Q. To your knowledge, was he or wasn't he?
>
> A. Yes, because we had discussed it. We had taken the statute and gone down his specific grounds for mitigating circumstances, and we could find no grounds, as you know what the six were.

(H.C. 245-46).

Consequently,

> In the sentencing portion of the trial, there were practically no mitigating circumstances brought forth at all. Mr. Darden was allowed to testify and did testify, did speak to the jury, made his own presentation to the jury.

The above testimony was given by trial counsel in 1979, before the magistrate, concerning a trial in 1973, one of the earlier post-Furman trials in Florida. This cannot be effective assistance. Even in 1979, counsel recognized the failings:

> A situation like State of Florida versus Willie Darden would not happen in that office right now. They have got a capital trial unit, a capital appeals unit. They are well aware capital cases are different, and they treat them as such.

A. RESTRICTIONS ON MITIGATING EVIDENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Perhaps the most firmly settled and closely enforced eighth amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized. Today it is clear that this mandate means that there can be no restriction, either expressly by statute, Lockett v. Ohio, 438 U.S. 586 (1978), or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979), upon the consideration of mitigating factors by judge or jury. The settled nature of this mandate places its critical importance beyond question, for it is at the heart of that which is required of the capital sentencing process.

This requirement that capital sentencing be based upon an individualized determination which accords full and fair consideration to the mitigating features, as well as the aggravating features, of each case has emerged as the central principle of the Court's eighth amendment jurisprudence. See Zant v. Stephens, ___ U.S.___, 103 S.Ct. 2733, 2743-44 (1983) ("What is important at the selction stage is an individualized determination...." (emphasis in original)). This is so because:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of

> the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of the factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. at 605 (emphasis added). This risk is "incompatable with the commands of the Eighth and Fourteenth Amendments." Id. See also Enmund v. Florida, 458 U.S. 782, 827-31 (1982) (O'Connor, J., dissenting) (summarizing the Court's holdings and rationale).

Accordingly, the complete consideration of the mitigating features of a case is the single most important safeguard for assuring reliability in the capital selection process. Where such features are excluded, the risk of mistake is too high to be constitutionally tolerable, thus the Court must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered ...," Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring) "[i]n order to ensure that the death penalty was not erroneously imposed ...." Id. at 118. That risk of error is great in the present case.

B. THE FLORIDA STATUTE RESTRICTED MITIGATING EVIDENCE IN 1974

The modern Florida death penalty statute was enacted in 1972, in the wake of Furman v. Georgia, 408 U.S. 238 (1972). Three separate provisions of the statute appeared on their face to limit consideration of mitigating factors to only those expressly set out in the statute. Section 921.141 (2), Florida Statutes (1975) directed that the jury consider:

> (a) whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) based on these considerations,

> whether defendant should be sentenced to life or death.

(emphasis added). The same direction was given to the judge in Section 921.141(3) to consider mitigating circumstances "as enumerated in subsection (7)" and to make written finding "based upon the circumstances in subsection (6) and (7)." Subsection 921.141(6) (referred to as subsection (7), above) states that mitigating circumstances "shall be the following: [list of specific factors]." Accordingly, from a plain reading of the statute, it appears that consideration of mitigating factors by judge and jury was limited to only those specifically set out in the statute. This reading was carried forward in State v. Dixon, 283 So.2d 1 (Fla. 1973), the landmark decision interpreting the statute. The court's emphasis in Dixon was on the consideration of statutory mitigating factors. The opinion refers frequently to "the" mitigating circumstances including in such references only the statutorily enumerated circumstances and specifically refers to "the mitigating circumstances provided in Fla. Stat. 921.141 (7), F.S.A." in describing the weighing process. Id. at 9. In dissent Justice Ervin's opinion also specifically acknowledges the limitation on consideration of mitigating circumstances. In the course of reviewing the statute, this Court suggested that the mitigating circumstances provision of the statute may be open-ended, Proffitt v. Florida, 428 U.S. at 250 n.8.

However, six days after Proffitt was announced, the Florida Supreme Court reviewed the statute and explicitly declared that the Florida statute did indeed restrict mitigating factors to those set forth in the statute, Cooper v. State, 336 So.2d 1133, 1139 &n.7 (Fla. 1976), cert denied, 431 U.S. 925 (1977), just as the statute said, as Dixon confirmed, and as counsel here believed. Cooper had proffered among other factors his stable employment history as a mitigating circumstance relevant to his character. The

sentencing judge, however, prohibited the introduction of such evidence at the penalty trial. The Florida Supreme Court held that the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute was "to examine in each case the itemized aggravating and mitigating circumstances." Id. at 1139 (emphasis added). The court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in Furman v. Georgia." Id. The court pointed to and emphasized the statutory limit on consideration of mitigating circumstances -- those "enumerated in subsection (7)," -- as showing the intent to avoid such arbitrariness. Id. at n.7 (emphasis in original). The court underscored that these were words of "mandatory limitation," Id. (emphasis in original), thus leaving no doubt as to its interpretation of the statute. With regard to the specific nonstatutory mitigating factor before the Court, it commented that "employment is not a guarantee that one will be law-abiding," and then expressed in its specific holding:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand that list.

Id. (emphasis added). A plain and fair reading of the opinion in Cooper was thus that consideration and presentation of mitigating factors was strictly limited to only those specifically set out in the statute, and had been so limited during Petitioner's trial. There is no lack of clarity in the words "mandatory limitation."

In the two years following the Cooper decision, the Florida Supreme Court adhered to its construction of the

mitigating circumstances provision as exclusive. See, e.g., Gibson v. State, 351 So.2d 948, 951 & n.6 (Fla. 1977); Barclay v. State, 343 So.2d 1266, 1270-71 (Fla. 1977). More importantly, Dixon, later ratified by Cooper, was the law when Mr. Darden's case was tried and it was the law that guided his defense counsel. It was not until almost six years later after trial that Lockett was announced, leading to the change in the Florida Supreme Court's interpretation. This Court has recognized the change in Florida law that occurred in 1978 rrom consideration of only "statutory mitigating circumstances" to "any mitigating circumstances." Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340, 347 n.4 (1984). See also Barclay v. Florida, 467 U.S. ___, 103 S.Ct. 3418, 3430 n.2 (1983) (Stevens, J., concurring).

After Lockett, the Florida Supreme Court did an abrupt turnaround and reconstrued the statute to allow nonstatutory mitigation. Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing). This reconstruction, though it may save the facial validity of the statute, cannot be held to apply to Mr. Darden, whose trial occurred when the state's highest court expressly applied the statute to restrict mitigating evidence. It is the statute and the Dixon holding that guided Mr. Darden's trial.

C. TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING

Petitioner's ineffective assistance of counsel claim is this: counsel did not prepare for sentencing, and as a result Petitioner was denied meaningful individualized consideration. Whether this was through counsel's neglect, Strickland v. Washington, 104 S.Ct. 2052 (1984), or because the State, through its statute, prevented such preparation, United States v. Cronic, 104 S.Ct. 2039 (1984), a reversal of Petitioner's sentence is required.

"[I]f counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 104 S.Ct. at 2047. Almost sleeping counsel is no counsel at all. There was no adversarial sentencing hearing. There was no hearing at all.

Similarly, if counsel's failings are assignable to the State, no prejudice need be shown. When the surrounding circumstances "make it so unlikely that any lawyer could provide effective assistance," then ineffectiveness is "presumed without inquiry into actual performance at trial." Id. at 2048. A statute that a lawyer reasonably believes to restrict mitigation produces, in an Eighth Amendment setting, surrounding circumstances making it impossible to perform as an advocate: advocacy requires investigating and producing mitigating circumstances, and the statute prevented it.

This Court should determine whether it is in fact ineffective per se for trial counsel in a capital case to not investigate to discover mitigating circumstances. If the statute makes an attorney's decision to forego investigation "reasonable," a straight Eighth Amendment violation arises, and no prejudice need be shown.

The Eleventh Circuit last addressed this issue in its 1983 panel 2-1 decision. Like the prosecutorial misconduct issue, this claim has laid dormant since the Witherspoon issue began steering the course of Petitioner's litigation. Strickland and Cronic have intervened, but the Eleventh Circuit has continued to restrict its rulings to the Witherspoon ground.

Petitioner must again stress that this is a first writ case, and the accelerated pace at which Petitioner must seek relief is occassioned by Respondent trying to moot the

orderly presentation of issues by eliminating him as a party to the litigation. This effort came while a stay was in effect, and should not be tolerated. Petitioner should be allowed to present this substantial claim to the Court in a well-reasoned petition.

Mr. Darden's lawyers, by their own admission, did nothing for sentencing. No prejudice need be shown. Prejudice is apparent, however. Not only did the statutory restriction on mitigating evidence convince counsel not to investigate, it also apparently induced counsel to not argue mitigation that was present. At sentencing closing argument, in a mere two and a half pages, counsel concluded: "I think that [sic] shouldn't kill Willie Jasper Darden, because God said you can't. I think that you shouldn't kill him because you might make a mistake." (R. 897). The judge himself determined there were two nonstatutory mitigating circumstances (innocence and family), but counsel did not even argue these to the jury. The resulting jury recommendation was thus robbed of any individualized considerations, and Petitioner's Sixth, Eighth, and Fourteenth Amendment rights were violated.

CONCLUSION

This is a first writ case. The well-established standards for granting a stay of execution pending the filing of a petition for writ of certiorari bear repeating:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305, 95 S.Ct. 1, 3, 42 L.Ed.2d 17 (1974)(Powell,

J., in chambers).
See Karcher v. Daggett, ___ U.S. ___, 102 S.Ct. 1298, 71 L.Ed.2d 635 (1982) (Brennan, J., in chambers).

White v. Florida, 457 U.S. ___, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982) (Powell, J., in chambers).

Unlike petitioner White, irreparable harm -- execution -- will result, without a stay. Petitioner Darden has, unlike White, specified the substantive issues for which certiorari will be sought and the reasons why review is appropriate. White v. Florida, supra, 103 S.Ct. at 1-2. The probability is reasonable that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari.

Without question, the granting of stays of execution is not automatic, Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311, 313 (1983). But "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), at 3391. Substantial legal issues are outstanding, which merit detached deliberation, without the urgency created by one party refusing to be bound by the rules of procedure. The constitutional claims of Petitioner DARDEN have been identified, and the case is clearly an exceptional one.

WHEREFORE, Petitioner WILLIE JASPER DARDEN, prays the Court through its Associate Justice to enter its order granting a stay of mandate herein and stay the execution of his death sentence scheduled to be carried out on Wednesday, 04 September 1985 at 7:00 a.m.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served on

The Honorable Jim Smith
Attorney General
Elliott Building
Tallahassee, Florida 32301 by hand/[redacted]

and

Mr. Richrd W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014 by [redacted]/mail

this 9th day of September, 1985.

Respectfully submitted

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RAH:b/